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IN THE

Supreme Court of the United States

BELINDA DUPUY, *et al.*,

Petitioners,

v.

ERWIN MCEWEN, DIRECTOR,
ILLINOIS DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN COALITION FOR FATHERS AND CHILDREN; CHILDREN'S LAW CENTER OF MINNESOTA; THE CIVITAS CHILDLAW CENTER OF THE LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW; FATHERS4JUSTICE; JUVENILE LAW CENTER; THE LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO AND THE SUPPORT CENTER FOR CHILD ADVOCATES IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici consist of seven non-profit organizations that serve low-income individuals and families or represent parents and children in child protection and related cases. *Amici* include the American Coalition for Fathers and Children, Children's Law Center of Minnesota, the Civitas ChildLaw Center of the Loyola University Chicago School of Law, Fathers4Justice, the Juvenile Law Center, the Legal Assistance Foundation of Metropolitan Chicago, and the Support Center for Child Advocates. A more detailed statement of *amici* interest is provided in the Appendix.

SUMMARY OF THE ARGUMENT

The Illinois Department of Children & Family Services ("DCFS") gives as many as 10,000 Illinois families each year what amounts to an offer they can't refuse: a so-called "safety plan" by which the State restricts the most fundamental aspects of the relationship between parents and their children. Such safety plans are implemented on the basis of what the Seventh Circuit aptly described as an "inarticulable hunch" that falls far short of even reasonable grounds,

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[1] Counsel of record for all parties were timely notified of the intent to file this brief and have consented to its filing. Copies of the consent letters are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission.

much less probable cause, to believe that the children whose safety is supposedly being protected are actually at risk. Based on anonymous or otherwise unreliable reports, those hunches are usually unfounded, as nearly two-thirds of DCFS investigations result in a finding that there is no credible evidence of abuse or neglect. Yet those hunches provide the putative justification for imposing safety plans of indeterminate length that, in practice, may stay in force for extended periods of time—during which parents may be banished from the family home, children may be sent to live elsewhere, parents and children may be forbidden from seeing each other, or all contact between parents and children may be supervised or subject to other onerous conditions.

This unprecedented and unwarranted intrusion by the State into the relationship between parents and children is implemented in an inherently coercive manner. Indeed, despite subjecting as many as 10,000 families each year to safety plans, DCFS has been unable to provide evidence of even a single instance where a safety plan "suggested" by DCFS has been rejected by the parents. Under these circumstances, the linchpin of the Seventh Circuit's conclusion that safety plans do not implicate Due Process rights—that such plans are voluntary—conflicts with both the decision of at least one other circuit regarding constitutional protections applicable to the imposition of safety plans, *Croft v. Westmoreland County Children & Youth Svcs.*, 103 F.3d 1123 (3d Cir. 1997), and legal principles articulated by this Court governing waiver of constitutional rights as well as limits on the State's power to disrupt the relationship between parents and children.

Although this Court has addressed other aspects of the State's interference with the relationship between parents and children, until now it has never had occasion to articulate the constitutional limitations governing the use of so-called "voluntary separation agreements" such as safety plans. Moreover, while the Court has hinted in dicta that children have constitutionally protected rights to the care, custody, and companionship of their parents, it has never squarely addressed that issue. The *amici* respectfully urge the Court to grant the writ of certiorari and use this case as a vehicle to provide Illinois and the rest of the nation with much-needed guidance regarding safety plan-type programs, to resolve the circuit split occasioned by the decision below, to eliminate the inconsistency between that decision and fundamental principles previously established by this Court, and to recognize children's fundamental liberty interest in their relationship with their parents.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO REAFFIRM THE IMPORTANCE OF THE FUNDAMENTAL RIGHTS INHERENT IN THE FAMILY RELATIONSHIP AND PROTECTED UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

The *Fourteenth Amendment's* Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." While the Due Process Clause affords certain procedural safeguards, it "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). This

Court has long recognized that it contains a "substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Washington*, 521 U.S. at 720). It "forbids the [State] to infringe fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington*, 521 U.S. at 721 (internal quotation omitted).

For nearly a century, the family relationship has been regarded as a fundamental liberty interest and afforded substantive due process protection. Indeed, the inherent nature of the family relationship has given rise to several separate yet interrelated liberty interests, including the right to "establish a home and bring up children," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the "freedom of personal choice in matters of . . . family life," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974), and the liberty interest in maintaining the integrity of the parent-child relationship, *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

Substantive due process protects the family from undue State intrusion because there is a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). This "Court has examined closely and contextually the importance of the government interest advanced in defense of the intrusion," *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), and the "usual deference to the [State] is inappropriate." *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

At stake in this case are three separate but related fundamental rights arising out of the family relationship. First, the family has a fundamental right to maintain its integrity. Second, a parent has the fundamental right to the care, custody, and companionship of his or her child. Third, a child has the reciprocal fundamental right to his or her parent's care, custody and companionship. These interrelated liberty interests are deeply rooted in our Nation's history and jurisprudence, and fall within the ambit of substantive due process protection. *See Hodgson v. Minnesota*, 497 U.S. 417, 444-48 (1990) (citing cases).

A. The Fundamental Right to Maintain Family Integrity is Protected by Substantive Due Process and Must Be Balanced Against the State's Compelling Interest to Protect Children.

The family has the substantive right to maintain its integrity. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Substantive due process "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503. The family is the foundation of our society—"the most fundamental social institution." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). Its importance "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . ." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)). Beyond this simple reason for recognizing

the right to family integrity, this Court has repeatedly held that matters involving family life are private which substantive due process shields from undue State interference. *See Moore*, 431 U.S. at 502; *M.L.B.*, 519 U.S. at 116; *Hodgson*, 497 U.S. at 446.

Because of the family's right to maintain its integrity, the State may only infringe this right to achieve a compelling interest. Substantive due process demands "particularly careful scrutiny of the state needs asserted to justify [the] abridgment" of family rights. *Moore*, 431 U.S. at 502 (internal quotation omitted). Where the State infringes upon the private choices "concerning the arrangement of the household, this Court has carefully examined the governmental interests advanced and the extent to which they are served by the challenged [State action]." *Hodgson*, 497 U.S. at 447 (internal quotation omitted).

Unquestionably, the State has a compelling interest to protect children from abuse and neglect. To achieve its goal, the State may have to remove a child from the custody of an abusive parent. Nevertheless, the State's compelling interest to protect children must be balanced against the family's substantive rights. *Croft*, 103 F.3d at 1125; *Darryl H. v. Coler*, 801 F.2d 893, 901 n.7 (7th Cir. 1986). While the family's right is not absolute, neither is the State's power to intrude on the family in the name of child protection. As the Third Circuit held in *Croft*, the State has "no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." 103 F.3d at 1126 (citing *Lehr*, 463 U.S. at 258).

The State carries the burden of gathering sufficient evidence that a parent is abusing or neglecting a child *before* it may take steps to infringe upon the family's substantive rights. *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000); *Croft*, 103 F.3d at 1125.

B. Parents Have The Fundamental Right to the Care, Custody and Companionship of Their Children That the State Cannot Infringe Absent Evidence That the Parent is Unfit.

One of the "oldest fundamental liberty interests" recognized by this Court is the "interest of parents in the care, custody, and control of their children." *Troxel*, 530 U.S. at 65. This Court in *Parham v. J.R.*, 442 U.S. 584 (1979), articulated the rationale for recognizing a parent's fundamental right:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . .

442 U.S. at 602 (internal quotations and citations omitted). A parent who has "demonstrated sufficient commitment to his or her children is . . . entitled to raise the child free from undue state interference,"

Hodgson, 497 U.S. at 447, and to the presumption that he or she acts in the best interest of that child. *Troxel*, 530 U.S. at 68-69.

A parent's right to raise his or her child without State interference is limited by the State's *parens patriae* interest in ensuring the child's welfare and safety. *Prince*, 321 U.S. at 166-67; *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). Where necessary, this interest gives the State authority to assume the parent's role and decide what is in the child's best interest. However, the State must first rebut the presumption that the parent acts in the best interest of his or her child before invoking its *parens patriae* interest. As Justice Stewart reasoned in *Smith*:

> [I]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter."

431 U.S. at 862-63 (Stewart, J., concurring) (quoting *Prince*, 321 U.S. at 166). Additionally, State action that needlessly or erroneously separates a parent from his or her child falls far from achieving any *parens patriae* interest, and is unconstitutional. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 47-48 (1981); *see also Parham*, 442 U.S. at 603 ("[T]he statist notion that governmental power should supersede parental authority in all cases

because some parents abuse and neglect children is repugnant to American tradition."). State action premised solely on protecting the child, absent establishing that the parent is unfit, offends substantive due process.

C. Children Have the Reciprocal Substantive Right to Their Parent's Care, Custody and Companionship That is Infringed When the State Unjustifiably Intrudes Upon the Family Relationship.

This Court has held that children possess certain fundamental rights that the State cannot infringe. *See Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969); *In re Gault*, 387 U.S. 1, 13 (1967); *Haley v. Ohio*, 332 U.S. 596, 601 (1948). While this Court has never held that a child has the substantive right to the care, custody and companionship of his or her parent, *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (reserving question), it stands to reason that such a right exists. Moreover, the Court has never squarely addressed the implication to a child's substantive rights when the State impermissibly interferes in the private realm of family life.

This Court should hold that in the family context, the child—like the parent—has substantive rights that protect against unwarranted State action. The child's substantive right is simply the reciprocal of the parent's fundamental right to care for the child. *See Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 1999) ("The right to family association includes the right of parents to

make important . . . decisions for their children, and of children to have those decisions made by their parents rather than the state."). The child, generally unable to care for his or herself, clearly has his or her own "complementary interest in preserving relationships that serve her welfare and protection." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). As Justice Stevens explained:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.

Id. at 88-89 (Stevens, J., dissenting) (citation omitted); *see also Santosky*, 455 U.S. at 760 ("[T]he child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

By affirming the child's reciprocal right, this Court would neither expand the list of substantive rights nor require states to recognize a new interest in the family relationship. Indeed, for nearly 90 years, this Court has

suggested in dicta that a child has reciprocal rights of his or her parents. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510, 510 (1925) (stating case involved "rights of the parents . . . to send their children to such schools, and the rights of the children themselves"); *Prince*, 321 U.S. at 165 (finding at stake "rights of children to exercise their religion, and of parents to give them religious training"); *Michael H.*, 491 U.S. at 131 (identifying child's liberty interest in maintaining filial relationship as "obverse" of father's). Many states already recognize that the child has a stake in decisions affecting the family relationship. *E.g.*, 705 Ill. Comp. Stat. 405/2-17 (2007) (Illinois statute requiring court to appoint guardian *ad litem* to represent child in every case of alleged abuse or neglect).

When the State infringes the parent's substantive right, it necessarily infringes the child's reciprocal right. *See J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir. 1997) ("forced separation of parent from child . . . represents a serious infringement upon both the parents' and child's rights") (internal quotations omitted). Because the child possesses the reciprocal right of his or her parent, the child's interests must also be considered in determining whether the State permissibly intruded into the family. *See Parham*, 442 U.S. at 631 ("Notions of parental authority and family autonomy cannot stand absolute and invariable barriers to the assertion of constitutional rights by children.") (Brennan, J., dissenting). The child's reciprocal substantive rights are equally important in determining whether State action is constitutional under substantive due process. A clear holding from this Court, recognizing

the child's reciprocal rights, would guide States in crafting their policies and practices designed to protect a child from an abusive or neglectful parent.

II. THE SUPREME COURT SHOULD REVIEW A PROCEDURE THAT SIGNIFICANTLY AFFECTS THE INTEGRITY OF THE FAMILY.

The safety plans implemented by DCFS drastically affect the parent-child relationship by ordering their separation, often for an indeterminate period of time, or otherwise placing significant restrictions on the relationship. Because safety plans can and do have lasting negative effects on the family, it is imperative that DCFS establish clearly-defined procedures that adequately represent all interests at stake in the process. DCFS has not done this. By failing to provide such procedures here, DCFS has failed to do what the Constitution requires—balance the State's interest in safety with the protections due families. The Supreme Court should grant certiorari in order to review this widely used procedure that impacts the most basic of family relationships.

A. The Forced Separation of Parent and Child Has Profound Immediate and Lasting Effects on the Family Relationship.

The separation of a parent and child, even temporarily, can have profound negative repercussions on all members of the family. "Certainly, even brief separation from parental care is an unfortunate and usually traumatic event for children." Comm. on Early Childhood, Adoption, and Dependent Care, Am. Acad.

of Pediatrics, *Health Care of Young Children in Foster Care*, 109 Pediatrics 536, 539 (2002); *see also* Testimony of Dr. Galatzer-Levy (N.D. Ill. No. 97 C 4199, Trial Tr. vol. 8, 1068, Sept. 12, 2002) ("Now, going forward the child has learned something very important and terrifying; that is, that the relationship with a parent can be suddenly and unpredictably interrupted so that the child is likely to be left with a fear of separation that may very well follow them throughout their lives."); N. Littner, *Some Traumatic Effects of Separation and Placement* 8 (1956) ("No matter what the realistic reason for the separation, the child seems to experience first . . . a feeling of abandonment, which contains elements of loss, rejection, humiliation, complete insignificance, and worthlessness.").

DCFS-implemented safety plans often require separating parent and child for varying periods of time, with predictably traumatic results. One mother in this case testified that while the safety plan was in place "[i]t was very hard for us to function through the day." (Trial Tr. vol. 4, 498, Sept. 6, 2002). Another mother testified that, even nine months after family reunification "[t]he kids are scared that their father will leave again." (*Id.* at vol. 6, 835.) A third mother testified that while the safety plan was in place, her son "didn't sleep. He would walk around looking for [his father] all night long." (*Id.* at 1324.)

Beyond the psychological effects, safety plans create a host of other practical problems that negatively impact families. For instance, DCFS's procedures provide no mechanism to ensure that a child's ongoing needs—beyond basic safety—will be met once a safety plan is

established. In many cases safety plans disrupt a child's medical care, schooling, and contact with extended family members. These other needs are often overlooked because they are not addressed in the Child Endangerment Risk Assessment Protocol ("CERAP") used by investigators to establish an appropriate safety plan, and investigators simply are not required to consider factors other than imminent safety. The CERAP's silence about a child's ongoing needs allows investigators to overlook those needs when crafting a safety plan, and can result in the denial of parents' requests to take such needs into account. In those cases in which parent representatives seek to raise concerns about such ongoing needs in connection with safety plans, DCFS often responds that investigators are not required to examine such issues because they are "only" conducting an abuse and neglect investigation.

The procedures also do not require that non-custodial parents be involved in the planning process, and consequently in many cases non-custodial parents are not informed of the safety plan or DCFS's involvement with their children. The protocol is silent on an investigator's duty to consult or even inform the non-custodial parent about the safety plan. But a non-custodial parent's involvement is more than a formality. A safety plan may place a child with a relative who lives farther away from a non-custodial parent or otherwise interferes with that parent's right to visitation. Without a coherent or consistent policy, investigators are not compelled to and do not involve non-custodial parents in the process. Because safety plans can have lasting

negative effects on the family, it is imperative that the State establish clearly defined procedures that adequately represent all interests at stake in the process.

B. The Seventh Circuit Failed to Consider the Negative Effects Safety Plans Have On the Family Relationship.

The Seventh Circuit trivialized the significant impact that DCFS's safety plans have on families by reducing family relationships to the type of monetary interests at issue in a tort lawsuit or suit for restitution. *Dupuy v. Samuels*, 465 F.3d 757, 761 (7th Cir. 2006). Such a commodified view of family relationships is anathema to this Court, which long ago declared it "plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley*, 405 U.S. at 651 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)). The Seventh Circuit characterized the safety plans as "voluntary," dismissing any possible implication of fundamental rights. However, the safety plan process can—and does—exclude individuals with cognizable liberty interests and valid concerns, and safety plans are comprised of several components that directly impact a family's well-being. The Seventh Circuit's treatment of safety plan agreements is in direct conflict with the Third Circuit's analysis. *Cf. Croft*, 103 F.3d 1123. In light of this conflict, lower courts facing similar issues will likely be influenced by the Seventh Circuit's decision, despite the court's paltry analysis of the fundamental rights that

"voluntary" agreements implicate. The Supreme Court should grant review to reaffirm the centrality of the fundamental right to familial relationships in the analysis of a State procedure that necessarily and significantly disrupts family integrity.

III. THE SUPREME COURT SHOULD DECLARE DCFS'S PROCEDURES FOR ESTABLISHING SAFETY PLANS UNCONSTITUTIONAL BECAUSE THEY FAIL TO ADEQUATELY SAFEGUARD THE FUNDAMENTAL RIGHTS OF PARENTS AND CHILDREN.

The voluntary removal of alleged perpetrators from the home may in some situations be a preferable alternative to taking a child into State custody. *See* Robin Fretwell Wilson, *Removing Violent Parents From the Home: A Test Case for the Public Health Approach*, 12 Va. J. Soc. Pol'y & L. 638 (2005). But without guiding standards, separation agreements, like the safety plans used by DCFS, fail to account for the fundamental rights at stake, leaving thousands of families to the unchecked discretion of State investigators.[2] The protocol governing DCFS-imposed safety plans fails to ensure that investigators honor parents' rights, with the result that investigators deprive parents of their right to the care and custody of their children without giving the parents

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[2] Many states use so-called "voluntary agreements" at the early stages of child protection investigations. *See generally* Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 Tenn. L. Rev. 835 (1998) (detailing controversy surrounding voluntary agreements and recommending specific legislative reforms).

a genuine choice in the separation decision and based on only a mere suspicion of abuse. Even worse, the safety plan protocol in no way accounts for a child's right to his or her parents' care.

DCFS also fails to provide any procedure that allows families to challenge the basis for imposing a safety plan or the terms of the plan. The Supreme Court should grant review in order to announce constitutional standards that would permit the use of voluntary removal agreements in appropriate situations while also ensuring that DCFS does not violate the rights of parents and children.

A. DCFS Procedures for Establishing Safety Plans Fail to Safeguard Family Rights.

DCFS developed the CERAP to guide investigators in determining whether to implement safety plans and crafting the terms of the safety plans. *Dupuy v. Samuels*, 462 F. Supp. 2d 859, 864 (N.D. Ill. 2005). Nevertheless, the CERAP fails to safeguard the fundamental rights of parents or children.

1. DCFS procedures fail to adequately safeguard parents' substantive rights to care for their children.

Voluntary alternatives to formal abuse and neglect proceedings such as safety plans have long raised due process concerns. Over thirty years ago, this Court acknowledged the debate over voluntary placements: "The extent to which supposedly 'voluntary' placements are in fact voluntary has been questioned. . . . For

example, it has been said that many 'voluntary' placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent." *Smith*, 431 U.S. at 834; *see also Croft*, 103 F.3d at 1125 n.1 (finding that threatening father with placing his child in foster care unless he left the home was "blatantly coercive"); *Gottlieb v. Orange County*, 84 F.3d 511, 515, 522 (2d Cir. 1996) (discussing parent's decision to move out of home rather than place child in temporary custody); *Myers v. Morris*, 810 F.2d 1437, 1443 (8th Cir. 1987) (noting that mother pressured and misled into signing authorization for voluntary placement of children in foster care); *Dietz v. Damas*, 932 F. Supp. 431, 437 (E.D.N.Y. 1996) (recounting mother's statement that she placed her son with grandparents "out of desperation" because investigators threatened to take child); Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Educ. Rev. 599, 601 (1973) ("A substantial degree of state coercion may be involved in many so-called voluntary placements, making the distinction between voluntary and coercive placement illusory.") (cited in *Smith*, 431 U.S. at 834).

"Voluntary agreements" are controversial because an initial abuse or neglect investigation provides fertile ground for coercive tactics. With child maltreatment investigations steadily increasing,[3] states have a strong interest in pursuing the voluntary removal of possible abusers to avoid the added burden on the state foster

[3] Child maltreatment investigations nationally increased from 1,766,190 in 2001 to 1,915,641 in 2005. Nat'l Ctr. on Child Abuse & Neglect, U.S. Dep't of Health & Human Serv., Child Maltreatment 2005 at Table 2-4 (2005).

care system. The incentive is passed along to investigators who encounter little resistance from parents who face having their child placed in foster care. Moreover, most parents involved with the child welfare system are poor and uneducated, Sedlak & Broadhurst, *Third National Incidence Study of Child Abuse and Neglect: Executive Summary* (1996); Panel on Research on Child Abuse and Neglect, National Research Council, *Understanding Child Abuse and Neglect* 123 (1993), leading to unequal bargaining power with State investigators and greater opportunity for coercion. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) ("great disparity in bargaining power" may vitiate consent).

The CERAP and form documents signed by parents do little to counteract the risk of coercive tactics. Investigators are not required to present families with the CERAP form that provides the basis for finding that a child is unsafe, depriving parents of any opportunity to identify errors or challenge conclusions. *Dupuy*, 462 F. Supp. 2d at 869. The safety plan agreement form neither explains the legal standards and procedures DCFS must follow in order to remove a child from the home, nor is the investigator required to inform the alleged perpetrator of the rights he will be waiving. *Dupuy*, 462 F. Supp. 2d at 869, 893. Even those aspects of CERAP that are intended to produce a truly voluntary agreement are ineffective in practice. For example, an investigator is expected to "discuss the family's ideas for a safety plan in an effort to work out mutually-agreeable terms." *Id.* at 867. Yet nearly every plaintiff in this case testified that in reality "the investigator simply presented a proposed plan for his/her signature

with little or no discussion of the plan terms or alternatives" and under the threat that their children would be removed if they refused to sign. *Id.* at 867-69.

Voluntary agreements are not only ripe for coercion, but by requiring only a "mere suspicion" of abuse or neglect before imposing a safety plan, families are left to the unchecked discretion of investigators. Under the current CERAP process, a safety plan is warranted if the investigator finds at least a "cause for concern" that one of 15 safety factors is present, but this term is not defined. *Id.* at 864-65. In actuality, the presence of certain safety factors is based on the allegations alone (sometimes the product of an anonymous hotline call), requiring no actual investigation or evidence. *Id.* n.1 (citing factors 10-14). Surrendering a family's short-term fate to an investigator's naked suspicions exposes a family to the possibility of arbitrary separation, and in light of the disparate duration of safety plans, the separation can be indefinite. *Id.* at 880-82 (noting that, although safety plans are intended to be short-term measures, safety plans in record lasted anywhere from seven days to 16 months).

DCFS's ostensible attempts to honor parents' rights through the CERAP are well-intentioned but seriously flawed. The CERAP fails to guard against the abuses that are unavoidable when a State actor has unfettered discretion to impose an impossible choice upon parents without any evidentiary requirement. The Court should grant review in order to establish clear constitutional standards that will guide child welfare agencies in developing policies that appropriately balance the state's interests and families' fundamental rights.

2. DCFS procedures completely disregard a child's right to be raised and nurtured by his parents.

While DCFS makes a failing attempt to honor *parents'* rights through the CERAP, it makes no attempt to protect a *child's* right to be raised and nurtured by his parents. The Supreme Court should use this opportunity to formally recognize a child's right to his parents' care, and establish standards that ensure that this right is honored when a voluntary separation agreement is put in place.

While this Court has strongly implied that a child has a right to his parents' companionship, *see Santosky*, 455 U.S. at 760, lower courts have expressly recognized that a parent's fundamental right to care for his or her child carries with it a child's reciprocal right to be raised and nurtured by his or her parent. *Brokaw*, 235 F.3d at 1018; *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) ("a child's right to family integrity is concomitant to that of a parent"); *J.B.*, 127 F.3d at 925 (recognizing that the forced separation even for a short time infringes the rights of parent and child). As the District Court in this case noted, when parents are separated from their children, "it is the children who lose the benefit of a stable environment." *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1130 (N.D. Ill. 2001).

When establishing safety plans, DCFS investigators are advised to interview alleged child victims but are not otherwise required to involve the child in the decision to implement a safety plan. If safety plans are voluntary agreements, they are voluntary only as to the parent.

The Court should declare unconstitutional a procedure that drastically affects a child's right to his parents' companionship, yet fails to safeguard consideration of the child's needs, circumstances and voice in the decision-making process.

B. DCFS Must Establish a Procedure to Challenge the Validity of Safety Plans and Alter Their Terms as Circumstances Change.

When DCFS has sufficient evidence indicating a safety risk to a child, a safety plan can be implemented to reduce the immediate risk of harm. However, it is inevitable that in some instances investigators violate constitutional rights when establishing safety plans that so significantly impact families. DCFS must afford families a meaningful post-deprivation process to contest the safety plan. Devising such a system would not be unduly burdensome for DCFS.

DCFS's own existing administrative procedures provide one possible model for such a post-deprivation process. For example, if a foster parent disputes a decision to remove a foster child from her home, she may request a Clinical Placement Review within three working days of notice of the removal. *See* 89 Ill. Admin. Code 337.30(c); DCFS Procedures 301.65. DCFS clinical staff must convene a Clinical Placement Review within five working days of a request. The purpose of the Clinical Placement Review is to review the child's placement, the reason for the disruption of placement, the child's needs, and the appropriateness and stability of the proposed placement. Because the separation of a parent and child can have devastating effects on a child,

there must be a similar mechanism to ensure that the State's plan to keep a child "safe" does not result in unnecessary harm to the child. A post-deprivation safety plan process before a neutral reviewer would improve outcomes for families.

In many situations, the absence of a post-deprivation review of the safety plan creates serious risks for children and families. In some situations, a parent who has been the primary caretaker of a child with complex medical needs may want the safety plan to allow for the continued care by that parent. The absence of a review means that these concerns may not be considered. Sometimes, the safety plan will expose a child to new risks. For example, there is no process to review parental requests that the agency modify a safety plan to limit contact by a relative with a violent history, even when the parent has some proof of the concern, such as a prior court order or evidence of domestic violence. If the investigator ignores the request, the parent cannot bring her concerns for an independent review of the risks to the child. In other cases, parents complete the services required by the safety plan, such as counseling, and ask DCFS to terminate the safety plan. When the investigator tells the parents that the plan will not end, parents have no mechanism to seek review of that decision. The child continues to suffer from the separation trauma and abandonment anxiety described above, without a meaningful review of whether compliance obviates the need for a continued plan.

Significantly, the Seventh Circuit's claim that parents can simply reject a safety plan does not remedy these situations. A parent's alternative to a safety plan

is a judicial proceeding to determine whether there is an "urgent and immediate necessity" to remove the child from that parent, not a hearing about whether the proposed safety plan is the right alternative. *See* 705 Ill. Comp. Stat. 405/2-10 (2007). There is no mechanism for parents to raise valid concerns for their child's well-being if the safety plan continues longer than anticipated or creates new risks. A post-deprivation safety plan process would accomplish the dual purpose of reviewing the need for the safety plan and reviewing the terms of the safety plan in order to minimize the trauma to the family.

CONCLUSION

For the reasons set forth above and in Petitioners' brief, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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American Coalition for Fathers and Children ("ACFC") is a Washington, DC non-profit organization with nationwide state organized affiliates advocating for children and parents involved in familial disputes. ACFC reviews state and federal legislation (existing and pending) impacting familial relationships as well as judicial decisions and interpretation of law impacting family association. In addition, ACFC advances education and conflict resolution protocols that promote communication and cooperation between parents with the knowledge that all fit parents have the right to equally participate in the rearing of their children. This particular case is of interest to ACFC because it involves the fundamental right to the parent-child relationship and due process of law as it applies to that right.

Children's Law Center of Minnesota ("CLC"), the only legal center for children in Minnesota, is a nonprofit organization whose mission is to advance the rights and interests of children in the judicial, child welfare, health care, and education systems. CLC represents children in the child welfare system and advocates for systemic reforms. CLC joins this brief because of the critical public policy issue at stake for the children it serves.

The Civitas ChildLaw Center is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its ChildLaw Clinic, the Center routinely provides representation to child clients in child

protection and other related types of cases. The Child Law Center maintains a particular interest in matters affecting the regulation of relationships between children, their parents and other adults.

Fathers4Justice, a national non-profit organization, helps fathers maintain relationships with their children and raises public awareness about the discriminatory impact child protection laws, regulations and policies have on fathers. Fathers4Justice's interest in this case is to ensure that a father's fundamental rights are protected against unnecessary disruption of his relationship with his child.

Juvenile Law Center ("JLC") is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies—for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide.

The Legal Assistance Foundation of Metropolitan Chicago ("LAF") is the largest provider of free civil legal services to low income individuals and families in Cook County, Illinois. LAF's Children's Law Project

represents parents, relative caregivers, foster parents and children involved in cases with DCFS in Juvenile Court and related administrative proceedings. LAF's clients have been adversely impacted by the DCFS policies and procedures in conducting abuse and neglect investigations and imposing safety plans. LAF, therefore, has a strong interest in protecting the rights of these individuals, including their right to a substantive review of the implementation and outcome of safety plans.

The Support Center for Child Advocates, a non-profit organization, provides free legal assistance and social service advocacy to abused and neglected children in Philadelphia, Pennsylvania. The organization also represents children in civil protective proceedings and in criminal prosecutions of their abusers.